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The Legal Implications of United States Policy toward Nicaragua: A Machiavellian Dilemma

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THE LEGAL IMPLICATIONS OF UNITED STATES POLICY TOWARD NICARAGUA: A MACHIAVELLIAN DILEMMA

The deterioration in relations between the United States and Nicaragua over the past five years presents important implications for international law. Nicaragua claims that recent United States' actions in Nicaragua violate specific norms of international law and behavior. The United States maintains that its actions are legal under international principles of collective self-defense. This Comment focuses on these conflicting claims and applies the relevant rules of international law in order to determine what violations of international law, if any, have occurred.

INTRODUCTION

"[T]here are two methods of fighting, the one by law, the other by force: the first method is that of men, the second of beasts; but as the first method is often insufficient, one must have recourse to the second."[1]

On the night of February 25, 1984, two Nicaraguan fishing trawlers were damaged by explosive devices as they entered the harbor of El Bluff, Nicaragua.[2] In the following month eight more Nicaraguan and foreign commercial vessels were damaged by underwater mines in Nicaraguan waters.[3] Although no ships were destroyed and no one was killed, the minings did result in the cancellation of shipments and the curtailment of normal maritime commerce to and from Nicaragua.[4]

Responsibility for the minings was originally attributed to *contra* guerrillas based in Honduras.[5] It, soon became apparent, however,

1. N. MACHIAVELLI, THE PRINCE (1513), *reprinted in* W. EBENSTEIN, GREAT POLITICAL THINKERS 296 (1969).

2. For more detailed accounts of the mining incident, see generally *Explosion over Nicaragua*, TIME, Apr. 23, 1984 at 16; L.A. Times, Mar. 5, 1985, at 1.

3. *Explosion over Nicaragua*, *supra* note 2.

4. *Id.* at 17.

5. *Contra* is the name given to the guerrilla forces currently engaged in fighting the Nicaraguan government. Many of the *contras* were members of the National Guard under the previous Somoza regime. As early as January 8, 1984, *contra* officials announced they were mining Nicaraguan ports to prevent the arrival of weapons from Cuba and the Soviet Union. *Explosion over Nicaragua*, *supra* note 2, at 19.

that the United States, through the Central Intelligence Agency (CIA), was involved in the planning and funding of the operation.[6] World opinion was critical of the United States.[7] On March 30, 1984, Nicaragua introduced a resolution in the United Nations Security Council denouncing the United States for the escalation of military aggression against Nicaragua.[8] The United States vetoed the resolution but only after all the members of the Council, except Britain, voted in favor of the resolution.[9]

On April 6, 1984, the United States announced that it would not accept the jurisdiction of the International Court of Justice (ICJ) over disputes involving Central America for the next two years.[10] The move was made in response to information indicating that Nicaragua was preparing to bring the mining dispute to the ICJ.[11] Nicaragua did institute proceedings against the United States in the ICJ on April 9, 1984.[12] Nicaragua's complaint stated that the United States' use of force against Nicaragua, and its intervention in Nicaragua's internal affairs, violated Nicaraguan "sovereignty, territorial integrity and political independence" and was contrary to "universally accepted principles of international law."[13]

The recent actions and policies of the United States toward Nicaragua reflect a Machiavellian approach to international relations. The United States has opted to use force rather than international

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6. The scope of the United States' involvement in the mining of Nicaragua's harbors became public in an article appearing in the Wall Street Journal on April 6, 1984: "The Reagan administration's role in the mining of Nicaraguan harbors is larger than previously disclosed, according to sources who say that units operating from a ship controlled by the Central Intelligence Agency in the Pacific participated in the operation." Rogers, *U.S. Role in Mining Nicaraguan Harbors Reportedly is Larger Than First Thought*, Wall St. J., Apr. 6, 1984, at 6, col. 1.

7. The Soviet Union accused the United States of "piracy" after a Soviet tanker was damaged on March 20, 1984. France condemned the mining of Nicaraguan waters as a serious threat not only to the economic life of the country but also to the "very life of its inhabitants." Even Great Britain, a United States ally, expressed disapproval of the mining operations. UN CHRON., vol.XXI, No.4, at 16 (1984). Criticism within the United States transcended party lines. Senator Barry Goldwater, a conservative, called the mining "an act of war" and one which violated international law. N.Y. Times, Apr. 11, 1984, at A1, col. 8. On April 10, 1984, the Senate voted 84 to 12 in favor of a resolution opposing the use of Federal funds to mine Nicaraguan harbors. N.Y. Times, Apr. 11, 1984, at A1, col. 8.

8. UN Doc. S/16463 of Apr. 4, 1984, *reprinted in* 22 I.L.M. 457, 669 (1984).

9. Countries voting in favor of the resolution were China, Egypt, France, India, Malta, the Netherlands, Nicaragua, Pakistan, Peru, Ukrainian SSR, USSR, Upper Volta and Zimbabwe. Great Britain abstained. For an account of the UN debate on this resolution, see UN CHRON., vol. XXI, No.4, at 3 (1984).

10. For a copy of the letter from United States Secretary of State George Schultz to Secretary General of the United Nations Javier Perez de Cuellar rejecting ICJ jurisdiction in Central American disputes, see 23 I.L.M. 457, 670 (1984).

11. N.Y. Times, Apr. 9, 1984, at A1, col. 2.

12. N.Y. Times, Apr. 1, 1984, at A1, col. 8.

13. Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Interim Protection Order of May 10).

law in resolving the current conflict in Central America. Funding *contra* rebels, mining Nicaraguan harbors, and rejecting ICJ jurisdiction are indicative of this policy of force over law. By choosing such a policy approach, the United States has tacitly condoned a principle generally regarded as anathema in international law — that *might makes right.*

Under international law, the United States has certain rights and remedies which have been triggered by Nicaragua's support of rebel insurgents in El Salvador.[14] Resorting to the unilateral and unlawful use of force, however, is not one of them. The lawful method of resolving the Nicaraguan conflict entails the use of international organizations such as the United Nations (UN) and the Organization of American States (OAS). By disregarding these legal channels, the actions of the United States diminish the effectiveness and credibility of international law.

This Comment analyzes Nicaragua's claims against the United States to determine whether the United States' actions in Nicaragua violate specific norms of international law and behavior. Nicaragua has publicly denounced the United States as an international outlaw.[15] Determining whether such a statement is merely rhetoric depends upon an examination of the substantiality of the claims of Nicaragua under the current rules of international law. Such a discussion, however, also requires an inquiry into whether the actions of the United States are justified under international law. The United States claims that its actions are legal under principles of collective self-defense because of Nicaraguan aid to rebel forces attempting to overthrow the government of El Salvador.

This Comment will further analyze the relevant principles of international law and apply them to the facts of this conflict. The reasons for undertaking such a discussion are twofold. First, if the actions of the United States in Nicaragua violate international law, it is important to document specific violations in order to prevent future recurrences of a similar nature. The announcement by the

14. *See infra* note 26. The basis of the conflict in Central America evolves from Nicaraguan funding and support of guerrilla forces attempting to overthrow the government of El Salvador. The United States, in backing the government of El Salvador, has pursued a policy aimed at ending Nicaraguan support of the Salvadoran rebels. The methods chosen to implement that policy are the subject of this Comment. For more background on the conflict in El Salvador, see generally Forche, *El Salvador: The Next Vietnam?*, 45 PROGRESSIVE 27-29 (1981); Pastor, *The Target and the Source: El Salvador and Nicaragua*, 5 WASH. Q. 116-127 (1982); and White, *Central America: The Problem That Won't Go Away*, N.Y. Times Magazine, July 18, 1982, at 21.

15. *See* L.A. Times, Jan. 19, 1985, at 20, col. 1.

United States on January 18, 1985, that it would boycott the ICJ proceedings in this case ensures that the legal issues involved will not be properly adjudicated in a court of law.[16] A refusal to appear before the ICJ, however, does not automatically absolve the United States of its international obligations. Possible violations of international law still have occurred and must be addressed.

Second, the inherent weaknesses of international law and the frequent inability of international organizations to prevent violations create a need for publicity and documentation. One method of strengthening international law is to expose wrongdoing and publicize illegal conduct in international affairs. Most countries are susceptible to the influences of world opinion regarding their character and conduct. Governments exhibit a certain deference to this influence and act with some measure of regard for it. Failure to do so leads to condemnation and isolation. The importance of publicizing nonconformity in international law was recognized by former Secretary of State Elihu Root who noted: "[I]t remains true and is universally recognized that the nation which has with it the moral force of the world's approval is strong, and the nation which rests under the world's condemnation is weak, however great its material power."[17] These considerations, Root argued, greatly influence the course of a states' conduct with regard to the rules of international law. For Root, the most effective method of enforcing international law was the "injury which inevitably follows nonconformity to public opinion."[18]

HISTORICAL BACKGROUND

The mining of Nicaraguan waters is the most visible event in a series of recent confrontations between the United States and Nicaragua. Relations between the two countries have become increasingly more hostile since President Reagan took office in 1981. In order to understand the present situation in Nicaragua, it is necessary to examine the events which preceded the current conflict.

Pre-1981

For much of this century, Nicaragua has been ruled by authoritarian dictators such as Anastasio "Tacho" Somoza and his son Anastasio "Tachito" Somoza.[19] Although democratic in name and firmly

16. *Id.* at 1, col. 3.
17. Root, *The Sanction of International Law*, 2 AM. J. INT'L L. 451, 456 (1909).
18. *Id.* at 456.
19. Valenta, *The USSR, Cuba, and the Crisis in Central America, reprinted in* CONGRESSIONAL RESEARCH SERVICE, *Should the United States be Prohibited from Military Intervention in the Western Hemisphere?* H.R. DOC. No. 226, 97th Cong., 2d Sess. 290 (1982).

aligned with the United States, the Somoza regimes were characterized by corruption and oppression.[20] The younger Somoza, head of Nicaragua from 1967 to 1979, wielded power and dominated elections through the use of the National Guard and other political devices.[21]

Beginning in the 1960s and continuing into the 1970s, however, anti-Somoza opposition groups began to emerge. One of these, the Sandinista National Liberation Front (FSLN),[22] became the leading opposition group to the Somoza regime.[23] By the late 1970s, opposition to Somoza's authoritarian rule was widespread.[24] In July 1979, internal and external factors combined to bring about the downfall of the Somoza regime. The result was the installation of a new Marxist government dominated by the Sandinistas.[25]

The establishment of a Marxist-dominated government in Nicaragua has resulted in a shift of influence in Central America. The United States is no longer the sole, dominant power in the region. The Soviet Union, Cuba, and other communist countries have established extensive military, economic, and social ties with Nicaragua.[26] One result of these ties is that Nicaragua currently acts as a conduit for military supplies from communist countries to rebels in El Salvador.[27]

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20. *Id.*

21. Pezzullo, *Intervention in Internal Conflict: The Case of Nicaragua*, 13 GA. J. INT'L & COMP. L. 201 (1983).

22. The "Sandinistas," as members of the FSLN are called, derived their name from a revolutionary hero of the 1930s, Augusto Cesar Sandino. In the 1960s and 1970s, the Sandinistas evolved into a conglomerate of Marxist and non-Marxist elements united under an anti-Somoza banner. Valenta, *supra* note 19, at 291.

23. *Id.* at 291.

24. *Id.* at 292.

25. *Cuba's Renewed Support for Violence in Latin America*, Special Report No. 90, U.S. DEP'T OF ST., Dec. 14, 1981.

26. *See generally* Valenta, *supra* note 19, at 291.

27. The United States has attempted to provide extensive documentation of Nicaraguan support of El Salvadoran rebels with release of the so-called "White Paper" on communist interference in El Salvador. This report indicates that between October 1980 and February 1981, Nicaragua was the staging site for a massive Cuban-directed flow of arms to Salvadoran guerrillas. *Communist Interference in El Salvador*, Special Report No. 80, U.S. DEP'T OF ST., Feb. 23, 1981. The State Department based its report on documents reportedly captured in 1980 and 1981 from communist rebels in El Salvador. The veracity of the White Paper has come under criticism from some quarters. *See* McGhee, *Foreign Policy by Forgery: The C.I.A. and the White Paper on El Salvador*, NATION, Apr. 11, 1981; Kwitny, *Apparent Errors Cloud U.S. "White Paper" on Reds in El Salvador*, Wall St. J., June 8, 1981. Other sources, however, have supported the White Paper's conclusion that Nicaragua is providing support to Salvadoran rebels. The Permanent Select Committee on Intelligence of the House of Representatives concluded: (1) a major portion of the arms and other material sent by Cuba and other communist coun-

These events have dictated the course of the Reagan administration's actions in Central America. Underlying the policies of the United States is the belief that Nicaragua, as a Cuban and Soviet surrogate, is escalating national ideological struggles and incidents of terrorism in Central America.[28] The Reagan Administration believes that Nicaraguan assistance to the Salvadoran guerrillas foreshadows an overall expansionist plan by communist countries, to impose Marxist-Leninist principles throughout Central America.[29] The response of the United States, therefore, is to provide additional military assistance to other Central American governments and covert support to exiled Nicaraguan insurgents fighting the Sandinista government.[30]

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tries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas; (2) the Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for logistics to conduct their financial, material and propaganda activities; (3) the Sandinista leadership sanctions and directly facilitates all of the above functions; and (4) Nicaragua provides a range of other support activities, including securing transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador. PERMANENT SELECT COMMITTEE ON INTELLIGENCE, H.R. DOC. NO. 122, 98th Cong., 1st Sess. 6. (1983). Sources independent of the United States government have reached similar conclusions. The Washington Post reported that a small village on Nicaragua's Pacific coast is being used as a base for smuggling arms to rebel forces in El Salvador. The report included interviews with anonymous area residents including one who stated: "I don't get involved in politics, but everyone around here knows they are carrying the arms to El Salvador." *Base for Ferrying Arms to El Salvador Found in Nicaragua*, Washington Post, Sept. 21, 1983 at A29, col. 1. The New York Times reported Western and Latin American diplomats in Nicaragua as confirming that the Nicaraguan government is sending military equipment to the Salvadoran insurgents and operating training camps for them in Nicaragua. *Salvador Rebels Still Said to Get Nicaraguan Aid*, N.Y. Times, Apr. 11, 1984, at A1, col. 5.

28. In response to a question about United States aid to El Salvador, President Reagan, in a March 1981 news conference stated:

> What we're doing in going to the aid of a government that asked that aid of a neighboring country - and a friendly country in our hemisphere - is try to halt the infiltration into the Americas by terrorists and by outside interference, and those who aren't just aiming at El Salvador but. . .are aiming at the whole of Central and possibly later South America and. . .eventually North America. [W]hat we're doing is trying to stop this destabilizing force of terrorism and guerilla warfare and revolution from being exported in here, backed by the Soviet Union and Cuba and those others that we've named.

The President's News Conference of Mar. 6, 1981, 17 WEEKLY COMP. PRES. DOC. 245, 248 (Mar. 9, 1981).

29. "Very simply, guerrillas, armed and supported by and through Cuba, are attempting to impose a Marxist-Leninist dictatorship on the people of El Salvador as part of a larger imperialistic plan." The President's Address Before the Permanent Council of the Organization of American States of Feb. 24, 1982, 18 WEEKLY COMP. PRES. DOC. 222 (Mar. 1, 1982).

30. Covert action has been described as the attempt "to influence the internal affairs of another nation." The primary characteristic of covert action is its secrecy. *See* Fatouros, *Covert Intervention and International Law*, 1975 PROC. AM. J. INT'L L. 192 (1975).

1981 to Present

In December 1981, President Reagan signed National Security Decision Directive 17 authorizing the CIA to recruit, arm, and train, for military purposes, Nicaraguan exiles hostile to the Sandinista regime.[31] The stated purpose of the Directive was to interrupt the flow of arms from Nicaragua to communist-led rebels in El Salvador.[32] An accompanying National Security Council document, however, stated that the CIA would build popular support in Central America and Nicaragua for an opposition front and "support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua."[33]

Throughout 1982, the United States-supported *contra* forces conducted numerous hit-and-run raids into Nicaragua.[34] The Nicaraguan government claimed that as a result of these raids, 114 Nicaraguans were killed in 1982 by the *contras*.[35] In addition, the *contra* forces increased in number from approximately 500 in December 1981 to almost 7,000 by May 1983.[36] Evidence that the *contra* forces were actively seeking to undermine the Nicaraguan government was provided by the Permanent Select Committee on Intelligence of the House of Representatives. In a report released on May 13, 1983, the committee concluded that the support and training of anti-Sandinista insurgents by the United States was aimed not only at preventing arms shipments to El Salvador, but also at overthrowing the Nicaraguan government.[37]

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31. *Explosion over Nicaragua*, *supra* note 1, at 18.
32. *Id.*
33. *Nicaragua's Sovereignty and Independence Should Not be Jeopardized by Military Activities, International Court of Justice Declares*, UN MONTHLY CHRON., vol. 21, No. 4, at 7.
34. For press reports concerning the United States support for covert military action against and within Nicaragua, see N.Y. Times, Nov. 5, 1981, at 1, col. 2; N.Y. Times, Mar. 11, 1982, at 1, col. 4; N.Y. Times, Mar. 14, 1982, at 1, col. 5; *A Secret War in Nicaragua*, NEWSWEEK, Nov. 18, 1982, at 42-53.
35. UN MONTHLY CHRON., *supra* note 32, vol. 4, at 8.
36. *Id.*
37. The activities and purposes of the anti-Sandinista insurgents ultimately shape the program. Their openly acknowledged goal of overthrowing the Sandinistas, the size of their forces and efforts to increase such forces, and finally their activities now and while they were on the Nicaraguan-Honduran border, point not to arms interdiction, but to military confrontation. As the numbers and equipment of the anti-Sandinista insurgents have increased, the violence of their attacks on targets unrelated to arms interdiction has grown, as has the intensity of the confrontations with Sandinista troops.
PERMANENT SELECT COMMITTEE ON INTELLIGENCE, H.R. DOC. NO. 122, 98th Cong., 1st

Despite the recommendation of the Intelligence Committee that support to the *contras* be terminated,[38] the United States' involvement in Nicaragua increased in 1983.[39] In September of that year, President Reagan approved a plan calling for expansion of the *contra* forces to between 12,000 and 15,000 men.[40] In a report to the Senate and House Intelligence Committees, the President emphasized the importance of destroying vital economic installations and inflicting harm on the Nicaraguan government.[41] Soon after, a series of attacks on important Nicaraguan facilities began. On September 8, 1983, *contra* forces severely damaged oil storage and pipeline facilities at Puerto Sandino on Nicaragua's Pacific coast.[42] In October, oil storage facilities at Benjamin Zeledon and Corinto were attacked, resulting in the loss of some three and a half million gallons of gasoline and diesel fuel.[43]

In November 1983 Congress enacted new legislation which appropriated an additional $24 million to finance "covert activities" in Nicaragua.[44] The stated purpose of the legislation, which President Reagan signed on December 8, 1983, was to support "directly or indirectly, military or paramilitary operations in Nicaragua."[45] During 1983, Nicaragua claimed that *contra* forces killed 1,030 Ni-

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Sess. at 11 (1983). The report further stated: "If there ever was a formula for U.S. policy failure in Central America, it would involve two elements: (1) acts that could be characterized as U.S. interventions in Nicaragua; and (2) an alliance with the followers of Somoza. Both characteristics can now be made." *Id.* at 3.

38. *Id.* at 4. On July 27 and 28, 1983, the House of Representatives debated whether to enact legislation terminating United States support for the *contra* forces. The House voted 228 to 195 in favor of terminating funds to the *contras*. 129 CONG. REC. H5881-82 (July 28, 1983). The measure, however, was defeated in the Senate.

39. In a speech on the floor of the House of Representatives the Chairman of the Permanent Select Committee on Intelligence, Representative Boland, commented on the increased activity:

> The most alarming change has been the expansion of the war in Nicaragua . . . . It is now an air and sea war. Insurgents have engaged in bombing raids on Nicaragua cities, airports, and harbors. Targets have been economic, such as the oil storage tanks in Corinto and the electrical generating plant and oil pipeline in Puerto Sandino.

129 CONG. REC. H8390 (daily ed. Oct. 20, 1983) (statement of Rep. Boland).

40. UN MONTHLY CHRON., *supra* note 32, at 9.

41. *Id.* at 9.

42. N.Y. Times, Oct. 13, 1983, at 12, col. 1.

43. *Id.* For a more detailed account of these CIA supported operations, see L.A. Times, Mar. 4, 1985, at 1, col. 1.

44. Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 1473.

45. Section 108 of the Act provides:

> During fiscal year 1984, not more than $24,000,000 of funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

Id. at 1475.

caraguans and wounded another 1,323.[46]

The conflict in Nicaragua further escalated in March of 1984. While Nicaraguan and foreign vessels were being damaged by underwater mines, *contra* forces launched coordinated attacks from Honduras and Costa Rica into Nicaragua.[47]

The furor following disclosure of CIA involvement in the mining of Nicaraguan waters was followed by widespread criticism of the United States for rejecting ICJ jurisdiction in the Nicaraguan proceeding.[48] Nicaragua's application to the ICJ included a request to the Court to initiate provisional measures for interim protection pending the final resolution of the proceedings.[49] The ICJ held hearings in late April of 1984 to consider Nicaragua's complaint and the United States' request that the case be dismissed on jurisdictional grounds.[50]

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46. UN MONTHLY CHRON., *supra* note 33, at 9.

47. *Explosion over Nicaragua*, *supra* note 2, at 16.

48. Mexican Foreign Minister Bernardo Sepulveda Amor called the mining of Nicaraguan ports illegal under international law and stated: "It is not valid to decide in a unilateral, arbitrary and discriminatory form that the international judicial norms do not apply to a state because this same state has decided that these are not applicable." N.Y. Times, Apr. 14, 1984, at A6, col. 3. Reaction within the United States was sharply divided. Senator Jesse Helms argued that the United States should not, as a general rule, accept the jurisdiction of the World Court in matters affecting national security. 130 CONG. REC. S4193 (daily ed. Apr. 10, 1984) (statement of Sen. Helms). Senator Kennedy, meanwhile, warned that in rejecting jurisdiction, the United States was threatening to destroy the effectiveness of the World Court in dealing with cases that the United States might take to the Court in the future. 130 CONG. REC. S 4145 (daily ed. Apr. 9, 1984) (statement of Sen. Kennedy).

49. Under Article 41 of the ICJ Statute, "provisional measures" may be requested when a state considers that the rights which form the subject of its application are in immediate danger. I.C.J. Statute art. 41, *reprinted in* I. BROWNLIE, BASIC DOCUMENTS IN INT'L LAW, 398 (1983).

50. Although the United States had previously asserted that the ICJ did not have jurisdiction in this matter, it was required under article 36(6) to present arguments supporting its position. Article 36(6) provides that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. The United States based its position on two grounds. First, Nicaragua had never formally consented to the Court's jurisdiction; the Court, therefore, lacked the authority to hear the case. The United States argued that Nicaragua's 1929 declaration purporting to accept the Court's jurisdiction had never come into force, and no instrument of ratification had ever been deposited with the League of Nations. Second, the United States' declaration of April 6, 1984 suspended its 1946 declaration recognizing the compulsory jurisdiction of the Court. *See* International Court of Justice: United States Recognition of Compulsory Jurisdiction, August 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598. The United States claimed that the current dispute involved countries other than just Nicaragua and the United States because Nicaragua's claims were "inextricably related" to the claims of other Central American states against Nicaragua. Therefore, according to the argument, those states were "indispensable parties" in whose absence the court could not properly proceed. The United States further contended that the Contradora process, not

On May 10, 1984, the ICJ unanimously ruled in favor of Nicaragua's provisional request that the United States cease mining and restricting access to and from Nicaragua's ports. The court also ruled, by a fourteen to one vote, that Nicaragua's right to sovereignty and political independence "should be fully respected and not jeopardized by any military or paramilitary activities."[51] The Court, however, did not resolve the question of whether it had jurisdiction to deal with the merits of the case. It elected to hold further hearings to decide the jurisdiction question at a later date.[52]

Hearings on the jurisdiction issue were resumed in October 1984. The arguments of the United States at these hearings were an expansion of the position taken in the interim proceedings in April.[53] The Court, however, refused to accept this position and voted, fifteen to one, that it had jurisdiction to hear the case.[54] Subsequently, the United States announced that it would boycott any further proceedings in the ICJ dealing with Nicaragua's application.[55]

General Nature of International Law

Introduction

In order to determine whether the actions of the United States toward Nicaragua violate international law, it is necessary to understand the general nature and sources of international law. The notion of a system of international law which guides the relations between states predates the emergence of nation-states in the Middle Ages. Philo, a first century philosopher, foresaw the need for legal order among different states.

> The Megalopolis, or Great City, . . . uses a single constitution and a single law . . . which enjoins what is to be done, and prohibits what is not to be done. But the variously situated states are unlimited in number and use different constitutions and dissimilar law; for in the different states various customs and laws have been invented and enacted.[56]

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the ICJ, was the "properly instituted regional process" to resolve the "current turmoil" in Central America. I.C.J. Public Sitting, Apr. 27, 1984, at 10:00 A.M., Verbatim Record, *passim*.

51. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Provisional Measures Order of May 10). The lone dissenting vote was cast by Judge Schwebel of the United States. In a separate opinion, Judge Schwebel argued that the Court's emphasis on the rights of Nicaragua alone was unwarranted and incompatible with the principles of equality of states and of collective security.

52. *Id.* at 189.

53. *See* I.C.J. Public Sitting, *supra* note 49.

54. *See* N.Y. Times, Nov. 27, 1984, at 1 col. 8.

55. *See* L.A. Times, Jan. 19, 1985, at 1, col. 3.

56. M. Sibley, Political Ideas and Ideologies 163 (1970).

Philo wrote these words at a time when the earth was considered to be flat and to extend only marginally beyond the boundaries of the Roman Empire. His perception of the need for consistent customs and laws between states, however, remains a basic principle of modern international law. Philo's reference to a system of international law is similar in nature to contemporary formulations. Under the current international order, international law refers to standards of conduct and norms of behavior by which states are bound in their relations with each other.[57] Unlike the legal structure in most countries, international law is not derived from a single source such as a constitution or a fixed body of rules. There are no universal laws or statutes governing a particular situation. Rather, international law derives from many different sources.[58]

Sources of International Law

The sources of law, from which nearly all current international conflicts are resolved, are outlined in article 38 of the Statute of the ICJ:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted at law;
> (c) the general principles of law recognized by civilized nations;
> (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[59]

Although this provision is generally accepted as enumerating the fundamental sources of international law, it is not exhaustive. Other potential sources of international law include decisions and resolu-

57. For similar definitions of international law, see C. HYDE, INTERNATIONAL LAW 1 (2d rev. ed., 1945) "The term international law may be fairly employed to designate the principles and rules of conduct declaratory thereof which states feel themselves bound to observe and, therefore, do commonly observe in their relations with each other."; J. BRIERLY, LAW OF NATIONS 1 (4th ed. 1949) "The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another."

58. "Sources" refers to the origins of the rules of international law, specifically the means by which rules of international law are created and their application secured. "The origins of the rules of international law . . . are the opinions, decisions or acts constituting the starting-point from which their more or less gradual establishment can be traced." Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BRIT. Y. B. INT'L L. 20, 29 (1925).

59. Statute of the International Court of Justice art. 38, para. 1, *reprinted in* I. BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 397 (1983).

tions of international organizations, unilateral acts of international law, and the application of the principles of *ex aequo et bono.*[60]

A certain hierarchy exists among the sources of international law. The most important source is international conventions.[61] This term commonly refers to bilateral and multilateral treaties, but may also include other types of international agreements.[62] Treaties establish the rules of law to be followed by states as a matter of legal obligation. As such, they have been analogized to contracts between private individuals.[63]

A second important source of international law is international custom, which has been defined as the constant and uniform principles and practices of law followed by states as a matter of obligation.[64] The relevance of custom to the international sphere is twofold. First, custom embodies a substantial proportion of international law. Second, custom, although it may be modified or replaced by treaties between the states directly involved, constitutes a fixed body of rules and principles by reference to which treaties must be interpreted in case of doubt.[65]

A third source of international law is what the ICJ statute terms "general principles of law." Professor Lauterpacht describes these principles "as obvious maxims of jurisprudence of a general and fundamental character."[66] The importance of these general principles as a source of international law is exemplified by instances in which treaties and custom provide no guidance. They permit gaps in international law to be filled by principles which are common to all, or at least the vast majority of national systems of law.

The two final sources of law listed in the ICJ statute — judicial

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60. Article 38(2) of the ICJ Statute provides that the list of sources in article 38(1) "shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." Equity is not only applied, but allowed to override all other rules in an *ex aequo et bono* decision. In this context, equity is used as a synonym for justice. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW, 44-45 (1980).

61. The importance of treaties as a source of international law is reflected by their increased usage over the past half century. *See* Gamble, *Multilateral Treaties: The Significance of the Name of the Instrument*, 10 CAL. W. INT'L L.J. 1 (1980).

62. Synonyms for treaties, or for particular types of treaties, include agreement, pact, protocol, charter, statute, act, covenant, declaration, engagement, arrangement, accord, regulation and provisions. *Id.* at 30, n.1.

63. H. LAUTERPACHT, INTERNATIONAL LAW, 58 (1970).

64. *Id.* at 61. Customary international law is evidenced by the executive, diplomatic, and judicial decisions of a state. The ICJ provided guidelines for the use of custom in international law in the *Asylum Case.* The Court held: "The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other party . . . and that the rule invoked . . . is in accordance with a constant and uniform usage practiced by the states in question." *Ayslum Case* (Colum. v. Peru) 1950 I.C.J. 276 (1950).

65. H. LAUTERPACHT, *supra* note 63, at 61.

66. *Id.* at 69.

decisions and the teachings of publicists — are not as significant as the three previously mentioned. These two sources serve "as subsidiary means for the determination of rules of law."[67] International judicial decisions, by rule, have no authority outside the case in which they are rendered.[68] As a matter of practice, however, the ICJ has repeatedly invoked and relied upon its own decisions.[69] Consequently, judicial decisions, although not binding, have become a rather persuasive source of international law.

The last source of international law deserving mention is the acts of international organizations. Resolutions of the UN General Assembly or the General Assembly of the OAS may be considered evidence of customary law because they reflect the views of the states voting for them.

APPLICATION OF INTERNATIONAL LAW TO THE U.S. — NICARAGUA CONFLICT

Treaties

Because of their importance in international law, treaties provide a logical starting point by which to examine the legality of the United States' actions in Nicaragua. The United States and Nicaragua are signatories to several relevant treaties. These treaties provide a source of guidance, regulation, and authority by which relations between the two countries are to be governed. Treaties are important in international law because they allow states to agree, prior to the inception of a dispute, on peaceful methods of conflict resolution. As such, treaties are a manifest expression of the parties' intentions.

United Nations Charter

The cornerstone of the UN and the post-World War II legal order is the prohibition of the use of force contained in article 2(4) of the UN Charter. That provision states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations."[70]

67. I.C.J. Statute art. 38(1)(d).
68. I.C.J. Statute art. 59 provides: "The decision of the court has no binding force except between the parties and in respect of that particular case."
69. H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 5-15 (1958).
70. U.N. CHARTER June 26, 1945, 59 Stat. 1031, T.S. No. 993.

The purpose of article 2(4) was to codify international norms prohibiting the use of force. Previous attempts to regulate aggressive behavior in international relations had proven insufficient. The League of Nations' parallel covenant to article 2(4) stated that league members were obligated not "to resort to war."[71] This terminology, however, left unmentioned hostilities which, although violent, could not be considered war. The drafters of the UN Charter wished to conclusively resolve the debate as to how much force could be considered an act of war. Thus, in drafting article 2(4), the term "war" was discarded and replaced by the phrase "threat or use of force." This wording was interpreted as prohibiting a broad range of hostile activities including not only "war" and other equally destructive conflicts, but also applications of force of a lesser intensity or magnitude.[72]

The unanimous adoption of two General Assembly resolutions has clarified the scope of article 2(4).[73] The first resolution — the Declaration of Friendly Relations — gives a more precise meaning to article 2(4). The Declaration describes behavior which constitutes the unlawful "threat or use of force" and enumerates standards of conduct by which states must abide.[74] Violation of any of these standards of conduct is declared to be contravention of article 2(4).[75]

The second resolution — the Definition of Aggression — provides

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71. *See* LEAGUE OF NATIONS COVENANT, June 28, 1919, 2 BEVANS 46, 1919, at Part I.

72. M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 142-43 (1961).

73. *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration on Friendly Relations]; Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter cited as Definition of Aggression].

74. The Declaration on Friendly Relations includes the following provisions:

A war of aggression constitutes a crime against peace for which there is responsibility under international law. Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes . . . .

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state . . .

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.
>
> No State shall organize, assist, ferment, finance, incite or tolerate subversive, terrorist or armed activities towards the violent overthrow of the regime of another State.

75. "By accepting the respective texts [of the Declaration on Friendly Relations], states have acknowledged that the principles represent their interpretations of the obligation of the Charter." Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 715 (1971).

a detailed statement on the meaning of the term aggression which is defined as "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations."[76] The resolution contains a list of acts which, regardless of a declaration of war, qualify as acts of aggression.[77] The resolution provides that a state which commits an act of aggression violates international law as embodied in the UN Charter.[78]

The actions of the United States in Nicaragua appear to fall within the scope of article 2(4), when interpreted in light of these resolutions. The illegality of aid to rebel groups such as the *contras* has been well established by the UN General Assembly. Both resolutions specifically prohibit the "organizing," "assisting," or "financing" of "armed bands," "mercenaries," or "terrorists" for the purpose of aggression toward or overthrow of another state.[79] According to one international law scholar, "a state uses force when it sends or permits the sending of irregular forces or armed groups, including non-nationals, across the frontier to operate in another state."[80] Similar conclusions condemning this type of unlawful use of force have

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76. Definition of Aggression, *supra* note 73, at 142.

77. These include under article 3:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State, for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

78. A fundamental purpose of the UN Charter is to "maintain international peace and security." U.N. CHARTER art. 1, para. 1. Article 5(2) of the Definition of Aggression, *supra* note 73, provides: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility."

79. *See supra* notes 74 and 77.

80. M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 748 (1968).

been expressed by the International Law Commission[81] and other jurists.[82]

Under article 2(4), the organizing, arming, training, and financing of *contra* forces by the United States[83] are clearly prohibited activities.[84] Evidence that the United States is involved in these activities is provided by the Congressional appropriation, in November of 1983, of $24 million in covert aid to *contra* forces.[85] The House Intelligence Committee described such covert aid as providing encouragement and support "to Nicaraguan exiles to foster insurgency within Nicaragua."[86] While President Reagan has portrayed the *contras* as "freedom fighters,"[87] Senator Kennedy has described *contra* activities as terrorism.[88] Under international law, acts of terror-

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81. The International Law Commission described as an offense against peace, "the organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another state . . . ." 45 AM. J. INT'L L. Supp. 128 (1951).

82. Professor Fawcett describes the nature of unlawful intervention:

> The entry into or presence in the territory of another state of governmental units or self-organized armed bands constitute, in so far as they are not permitted by the United Nations Charter, a violation of the territorial integrity of that state;
>
> The use of force by such units or bands, for the purpose of "subverting the will of the people" and weakening or overthrowing the established political order of another state, is an act against the political independence of that state contrary to Article 2(4);
>
> A state will be using such force in so far as it sends these units or bands across, or encourages or tolerates their crossing the frontier, or assists them when they are already in the territory of the other state.

Fawcett, *Intervention in International Law, A Study of Some Recent Cases*, 103 RECUEIL DES COURS, 347, 359 (1961 Vol. II).

83. According to the Washington Post, over $80 million has been spent since 1981 in funding the *contras*. For an account of the CIA's role in supporting the *contras*, see Dickey & Cody, *The CIA and Its Not-So Secret War*, Wash. Post Nat'l Weekly Ed., Dec. 31, 1984, at 9-10.

84. An example of the type of activity prohibited by article 2(4) occurred in post-World War II Greece. Rebel forces fighting the Greek government were being furnished with both military aid and the use of territory for military bases by Albania, Bulgaria, Yugoslavia and Romania. The United States condemned such activities as violating "the territorial integrity and political independence of Greece." 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 734 (1971). McDougal and Feliciano cite the Greek situation to support their position that such "indirect aggression" violates article 2(4): "[A] government which gives military aid to groups which commit armed subversive or terrorist activities against another state by financing, organizing, training, or supplying them with arms or material, vicariously engages in the illegal use of force." *Id.* at 737. *See also* Fawcett, *supra* note 82, at 359.

85. *See supra* notes 44-45 and accompanying text.

86. PERMANENT SELECT COMMITTEE ON INTELLIGENCE, H.R. DOC. NO. 122, 98th Cong., 1st Sess. at 2 (1983).

87. Question-and-Answer Session With Reporters, 19 WEEKLY COMP. PRES. DOC. 650 (May 4, 1983).

88. In a debate on the Senate floor, Senator Kennedy produced the affidavit of an American priest living in Nicaragua, recounting incidents of violence by *contras* aimed at Nicaraguan civilians. The incidents included the murdering, raping, and beating of civilians and burning of Nicaraguan villages. Senator Kennedy stated: "I do not see how anyone could label that kind of activity as anything but terrorism . . . ." 130 CONG.

ism are indisputable violations of article 2(4).[89]

The presence of rebel forces, which promote insurgency within the borders of another country, in past instances has been determined to be a violation of the UN Charter. For example, following World War II, several thousand dissident Chinese nationalist soldiers remained in Burma.[90] Burma brought the problem to the UN. The General Assembly found the presence of the nationalist forces contrary to the UN Charter and "violative of the territory and sovereignty of the Union of Burma."[91] The UN demanded that the foreign forces disarm and either agree to internment or to leave Burma's territory.[92]

More recent examples of the illegal use of force across international borders include the United States-sponsored invasion of Guatemala in 1954 and the Bay of Pigs incident in 1961.[93] Both events are comparable in many respects to the current situation in Nicaragua. The 1954 invasion of Guatemala was a CIA operation aimed at overthrowing the leftist government of Jacobo Arbenz.[94] As in the present Nicaraguan conflict, Honduras was used as a base of operations for the armed units. In response to the invasion, Guatemala appealed to the UN Security Council to "put a stop to the aggression in progress against it."[95] The Security Council adopted a resolution urging an end to the hostilities and calling on members to refrain from assisting the belligerents.[96] When the United States-

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REC. S4149 (daily ed. Apr. 9, 1984) (statement of Sen. Kennedy). For further accounts of unlawful *contra* violence, see Barger, *The Story of the Guerrilla Manual Reveals Atrocities by Rebels*, Wash. Post Nat'l Weekly Ed., Nov. 12, 1984, at 17; and Rosenberg & Yozell, *Nicaragua 1984: The Clash Between Progressive Revolution & United States Violations of International Laws*, 13 IMMIGRATION NEWSLETTER Vol. 5-6, at 4 (1984).

89. Article 2(6) of the Draft Code of Offenses Against the Peace and Security of Mankind, prepared by the International Law Commission, prohibits "[t]he undertaking or encouragement by the authorities of a state of terrorist activities in another state, or the toleration by the authorities of a state of organized activities calculated to carry out terrorist acts in another state." 45 AM. J. INT'L L. Supp. 128 (1951).

90. 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 7 (1971).

91. *Id.* at 7.

92. *Id.*

93. M. SORENSEN, *supra* note 80, at 748. Sorenson claims a state uses force when it sends or permits the sending of irregular forces or armed groups across borders to operate in other states. "Contemporary history abounds in examples of this type of the use of force: the invasion of Guatemala . . . in 1954; the invasion of Cuba — the Bay of Pigs incident — 1961." *Id.*

94. Carto, *The Monroe Doctrine in the 1980's: International Law, Unilateral Policy, or Atavistic Anachronism?*, 12 CASE W. RES. J. INT'L L. 203, 215 (1981).

95. Nanda, *The United States Action in the 1965 Dominican Crisis: Impact on World Order - Part II*, 44 DEN. L.J. 225, 247 (1967).

96. *Id.* at 247-248.

supported insurgents continued fighting in violation of the resolution, Guatemala renewed its appeal to the Security Council. This time, the Security Council debate on the incident was blocked by the United States.[97] Subsequently, the coup successfully toppled the Arbenz government and installed a dictatorship. The Security Council, in adopting the resolution, acted within the scope of its power under article 39 of the UN Charter to determine the existence of an "act of aggression."[98] The action of the Security Council signified that the United States-supported invasion was an act of aggression in violation of the UN Charter.

An incident similar to the Guatemala situation developed in April 1961 when approximately 1,400 Cuban exiles, organized and directed by the CIA, launched an amphibious invasion of Cuba at the Bay of Pigs.[99] The operation, however, was a failure and the exiles were quickly forced to surrender.[100] As in the Guatemala incident, the U.N. adopted a resolution calling on the parties to "abstain from any action which may aggravate existing tension."[101] Although it was not specifically condemned in the resolution, the complicity of the United States in supporting the Cuban exiles was tacitly viewed as an act of aggression.[102]

In both of these situations, as in Nicaragua today, the United States organized and financed the invasion of another country by forces committed to overthrowing a legally recognized government. According to the terms of the UN resolutions on aggression and friendly relations, and based on UN practice, such conduct is impermissible under article 2(4) of the UN Charter.[103]

Charter of the Organization of American States

The OAS is an international regional organization consisting of twenty-eight member countries in the Western Hemisphere.[104]

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97. Akenhurst, *Enforcement Action by Regional Agencies, With Special Reference to the Organization of American States*, 42 BRIT. Y. B. INT'L L. 175, 181 (1967).

98. U.N. CHARTER art. 39.

99. N.Y. Times, Apr. 22, 1961, at 1.

100. Rowles, *The United States, The OAS, and the Dilemma of the Undesirable Regime*, 13 GA. J. INT'L & COMP. L. 385, 397 (1983).

101. *Id.*

102. In a speech before the American Society of International Law, Professor Wright reflected on the Bay of Pigs incident: "If the United States was guilty of complicity in the departure of a military expedition from its territory or its leased islands, it was guilty of 'aggression.' Aggression includes government complicity in, or toleration of, the passage from its territory with hostile intentions of a military expedition or enterprise." Wright, *Intervention and Cuba in 1961*, PROC. AM. J. INT'L L. 2, 17 (1961).

103. "[A]s was clear in both the Guatemala and the Bay of Pigs cases, such support of armed paramilitary attacks against Nicaragua constitutes a flagrant violation of article 2(4) of the United Nations Charter . . . ." Rowles, *supra* note 100, at 403. *See also* M. SORENSEN *supra* note 80, at 748.

104. Baum, *The Organizations of American States*, 1981 SAO PAULO CONFER-

Formed in 1948, the OAS was designed to provide a forum for economic, political, and social cooperation, and as a means of settling disputes between its members.[105] Article 18 of the Charter provides:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against its political, economic and cultural elements.[106]

Article 20 of the Charter further provides that "[t]he territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever."[107]

The prohibition of intervention by the OAS Charter has its origins in the Monroe Doctrine. First expressed in a statement by President James Monroe to Congress in 1823, the Doctrine established the principle that European states should not interfere in the affairs of the Western Hemisphere.[108] By the twentieth century, however, Latin American countries were concerned more about intervention by the United States than by European powers.[109] This wariness led

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ENCE ON THE LAW OF THE WORLD 1. *See generally* ORGANIZATIONS OF AMERICAN STATES, A HANDBOOK (1977).

105. Baum, *supra* note 104, at 1.

106. ORGANIZATION OF AMERICAN STATES CHARTER, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, *amended by* Protocol of Buenos Aires, Feb. 27, 1967, art. 15, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter cited as OAS CHARTER]. References in the text to provisions of the OAS Charter are to the numbers of such articles currently in force under the revised OAS Charter. Note that former articles 15 and 17 are now articles 18 and 20. The OAS Charter is reprinted in F.V. GARCIA-AMADOR, THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS, & OTHER DOCUMENTS pt. 2, 425-32 (1983).

107. OAS CHARTER, art. 20.

108. With the movements in this hemisphere we are of necessity more immediately connected . . . . The political system of the [European] powers is essentially different . . . from that of America . . . . [W]e should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.

Annual message to Congress, A.M. STATE PAPERS, 5 FOREIGN RELATIONS 250 (Dec. 2,1823), *reprinted in* 6 J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 401 (1906).

109. For a time, the Monroe Doctrine was used as a justification for United States intervention in Latin American affairs. "As the United States emerged as a world power in the years prior to World War I, the Monroe Doctrine was expanded and reinterpreted to justify the assertion of U.S. power in Latin America." Carto, *supra* note 94, at 207. This was manifested in President Theodore Roosevelt's message to Congress on December 6, 1904:

> Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere, of the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence,

to the adoption in 1933 of the Convention on Rights and Duties of States.[110] This Convention formally prohibited intervention in the affairs of Latin American countries.[111] The principle of non-intervention enunciated by the convention became the basis of articles 18 and 20 of the OAS Charter.[112]

Articles 18 and 20 constitute an extensive, broadly worded prohibition of unilateral and collective acts of intervention.[113] Their language barring intervention, whether "direct or indirect," encompasses situations in which a state uses its own military forces and those where the state makes use of a surrogate or mercenary force. Furthermore, the Charter reemphasizes the doctrine of territorial inviolability by forbidding, even temporarily, the military occupation of another country.[114]

The draft of a resolution currently under consideration by the OAS General Assembly demonstrates the comprehensiveness of those acts considered contrary to the non-intervention principles contained in the OAS Charter.[115] Under the terms of the resolution, a violation of the principle of non-intervention would include (although it is not limited to) the following acts: (1) the concentration of armed forces or disproportionately large scale military maneuvers along the border of another state, if the circumstances or the relationship between those states support an inference of a purpose to intimidate; (2) naval or air maneuvers carried out in waters adjacent to those within the jurisdiction of a state, by foreign ships or aircraft, if motivated by a desire to intimidate; and (3) the organization, support, promotion, financing, instigation, or tolerance of armed, subver-

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of the exercise of an international police power.
J. RICHARDSON, 14 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT at 6923 (1970).

110. *See* Convention on the Rights and Duties of States, Dec. 29, 1933, 49 Stat. 3097, T.S. No. 881, *reprinted in* THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS & OTHER DOCUMENTS, *supra* note 106, pt. 1 at 81. The principles adopted in the Convention were the "result of a Latin American obsession with proclaiming an absolute doctrine of non-intervention and binding every nation in the hemisphere, including the United States, to adhere." Comment, *The United States Action in Grenada: An Exercise in Realpolitick*, 16 INTER-AM. L. 53, 80 (1984).

111. Article 8 provides: "No state has the right to intervene in the internal or external affairs of another." The Convention was ratified by both the United States and Nicaragua.

112. Thomas, *Non-Intervention and Public Order in the Americas*, PROC. AM. SOC'Y INT'L L. 72 (1959).

113. The prohibition on illegal collective intervention by two or more countries is to be distinguished from legitimate "collective action" which arises when the competent organizations (i.e., the UN, the OAS) authorize intervention measures through a group of states to maintain international peace and security. *See* F.V. GARCIA-AMADOR, *supra* note 106, at 91.

114. OAS CHARTER art. 20.

115. The "Draft Instrument," as well as the "Statement of Reasons," is contained in OAS DOC. QEA/SER. G, CP./DOC. 388/74, Dec. 5, 1974, *reprinted in* F.V. GARCIA-AMADOR, *supra* note 106, at 97.

sive, or terrorist activities that affect another state, participation in a foreign civil war.[116] All of these activities violate the broad principles of non-intervention which form the foundation of the OAS system.

Employing the guidelines set forth in the OAS resolution, the actions of the United States against Nicaragua violate the OAS Charter.[117] The support of *contra* forces attempting to overthrow the Nicaraguan government constitutes indirect intervention in the affairs of that country. Under article 20, the mining of Nicaraguan harbors is an illegal encroachment upon Nicaragua's territorial sovereignty. In addition, the mining severely impairs the ability of Nicaragua to engage in international trade and commerce.[118] This type of economic interference is prohibited by article 18. Further, the presence of *contra* forces on both sides of the Nicaragua — Honduras border,[119] the stationing of United States battleships off of the Nicaraguan coast,[120] and numerous transgressions of Nicaraguan airspace by United States military planes,[121] are all considered contrary to non-intervention principles.

Additional Treaty Obligations

In addition to international multilateral treaties such as the UN and OAS Charters, the United States and Nicaragua are subject to the terms of less comprehensive multilateral and bilateral treaties which have been signed and ratified by the two countries and are still in force.[122]

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116. F.V. GARCIA-AMADOR, *supra* note 106, at 98.

117. This conclusion is supported by many familiar with the situation. In a debate on the House floor, one Congressman stated: "Appropriating funds with the intention of overthrowing the legal and recognized government of another member . . . in this case the Government of Nicaragua, clearly violates the Charter of the O.A.S." 129 CONG. REC. H8424 (daily ed. Oct. 20, 1983) (statement of Rep. Coyne). "Given the recurrent reports of United States support for covert military action against and within Nicaragua, it should be stressed that articles 18 and 20 clearly prohibit any such covert operations." Rowles, *supra* note 100, at 391.

118. Commercial vessels from Holland, Panama, and Japan were damaged from mines planted in the harbors of Corinto and Puerto Sandino. (These two ports handle 96 percent of Nicaragua's shipping activity.) Commercial shipments to and from Nicaragua were temporarily curtailed during the busiest months of the year. (The coffee and cotton harvests are ready for export in April and May.) Drinan, *C.I.A. Faces World Court Suits, U.S. Faces Resentment for Nicaraguan Harbor Mining*, Nat'l Cath. Rep., Apr. 20, 1984, at 1.

119. UN MONTHLY CHRON., *supra* note 33, at 8.

120. *Id.* at 9.

121. *Id.*

122. *See generally* TREATIES IN FORCE, U.S. DEP'T OF STATE, PUB. NO. 9351 (1984).

The Convention Concerning the Duties and Rights of States in the Event of Civil Strife[123] was the first multilateral treaty in the Western Hemisphere to define the permissible conduct of states in the event of civil strife in another country.[124] Article (1) of the convention forbids the transfer of arms and war material to rebel forces in other countries "while the belligerency of the rebels has not been recognized, in which. . . case the rules of neutrality shall be applied."[125] The convention prohibits subversive activities instigated, organized, or generally financed by "extracontinental powers."[126] Consequently, the United States has violated its legal obligations under this convention by supplying arms, ammunition, and war materials to *contra* forces engaged in civil strife against Nicaragua.

Five years after the Convention Concerning the Duties and Rights of States, twenty-five countries, including six in Europe, signed the Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Treaty) in Rio De Janeiro.[127] According to the terms of the treaty, the contracting parties formally condemned wars of aggression in their mutual relations. They pledged to settle any disputes or controversies by employing only pacific means sanctioned by international law. The parties agreed that under no circumstances would they resort to intervention, either diplomatic or armed, as a means of conflict resolution.[128]

The United States has utilized both diplomatic and armed intervention in Nicaragua, and has therefore acted in contravention of the terms of this treaty. In fact, the actions of the United States constitute a hybrid of the aforementioned types of intervention. The term "gunboat diplomacy" has been used to describe United States foreign policy, which is characterized by diplomatic pressure on the Sandinista leaders, coupled with continued support of the *contra* rebels.[129] By employing the use of force and armed aggression rather

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123. Convention Concerning the Duties and Rights of States in the Event of Civil Strife, Feb. 20, 1928, 48 Stat. 2749, T.S. No. 814 [hereinafter cited as the Convention Concerning the Duties and Rights of States].

124. Civil strife or civil war has been defined as "an armed struggle by a group or citizenry against the established order in order to obtain power over its own state." Diab v. Attorney-General, 1952 INT'L L. REP. 550, 551 (1952).

125. Convention Concerning the Duties and Rights of States, *supra* note 123, at art. 1, Third.

126. *See* F.V. GARCIA-AMADOR, *supra* note 105, vol. II, at 286.

127. Anti-War Treaty of Aggression and Conciliation, Oct. 10, 1933, 49 Stat. 3363, T.S. No. 906 (also known as the Saavedra Lamas Treaty). Nineteen American countries (Argentina, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Savador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay and Venezuela) and six non-American countries (Bulgaria, Czechoslovakia, Finland, Romania, Spain and Yugoslavia) became parties to the "Saavedra Lamas Pact."

128. *Id.* at art. III.

129. *See generally Reagan's Gunboat Diplomacy*, NEWSWEEK, Aug. 1, 1983, at

than conciliation, the United States has violated the terms of the Saavedra Lamas Treaty.

The principle of non-intervention among American states was formally adopted in 1933 in the Convention on the Rights and Duties of States.[130] The prohibition by the Convention of intervention in the internal or external affairs of other states was strengthened in 1936 by the signing of the Additional Protocol Relative to Nonintervention.[131] The members of the 1936 conference in Buenos Aires desired a more comprehensive expression of the principle of non-intervention than that contained in the 1933 Convention. For this reason the delegates formulated article 1 which states: "The High Contracting Parties declare impermissable the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties."[132] By prohibiting both direct and indirect intervention, the drafters of the treaty demonstrated their concern with both foreign invasion and invasion by subversive organizations supported by foreign countries. Under the terms of this treaty and regardless of the justification, the support of the *contras* by the United States constitutes indirect intervention in the affairs of Nicaragua.

The primary method of resolving international conflicts was codified in another treaty enacted by the delegates in Buenos Aires in 1936. In the Convention to Coordinate, Extend and Assure the Fulfillment of the Existing Treaties Between the American States,[133] the signatories affirmed their obligation "to settle, by pacific means, controversies of an international character that may arise between them."[134] The parties agreed to settle disputes through such peaceful procedures as direct diplomatic negotiation, mediation, commissions of inquiry, commissions of conciliation, tribunals of arbitration, and courts of justice.[135]

The United States has violated the terms of this treaty by resorting to a policy of force rather than conciliation. An alternative dis-

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130. *See* Convention on the Rights and Duties of States, *supra* note 110.

131. Additional Protocol Relative to Nonintervention, Dec. 22, 1936, 51 Stat. 41, T.S. No. 923 (also ratified by both the United States and Nicaragua).

132. *Id.* at art. I.

133. Coordination, Extension, and Fulfillment of Existing Treaties Between the American States, Dec. 23, 1936, 51 Stat. 116, T.S. No. 926 [hereinafter cited as the Convention to Fulfill Existing Treaties].

134. *Id.* at art. 1.

135. *Id.* at art. 4.

pute resolution procedure, the Contadora negotiations,[136] has been endorsed by the United States and Nicaragua. Neither country, however, is a member of the Contadora Group,[137] a body which seeks to achieve a peaceful solution to the conflict in Central America.

The existence of a separate negotiation process does not relieve the United States from its obligation, under the Convention to Fulfill Existing Treaties, to settle all controversies through pacific means. The United States instigated its policy of force against Nicaragua two years prior to the commencement of the Contadora process and has followed this policy to the present day. The United States' claim that it is fulfilling its legal duty, through the Contadora, to resolve the conflict by pacific means[138] rings hollow in light of the mining of Nicaraguan harbors and the increased support given to *contra* rebels.

The Treaty of Friendship, Commerce and Navigation [139] is a bilateral treaty signed by the United States and Nicaragua on January 21, 1956.[140] The stated purpose of the treaty was to improve economic and cultural relations between the two countries.[141] Accordingly, article 19 provides that "[b]etween the territories of the two Parties there shall be freedom of commerce and navigation."[142] In providing for freedom of navigation, the treaty sought to insure that

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136. Contadors is the name given to the continuing efforts of Colombia, Mexico, Panama, and Venezuela to resolve the crisis in Central America. The foreign ministers of these countries met for the first time in January 1983 on the Isla de Contadora. Their purpose was to initiate dialogue and negotiation between the countries of Central America in order to reduce the tensions in that region. The Contadora negotiations have had limited success thus far. The four countries were able to draft a document of objectives containing twenty-one basic points for achieving peace in Central America. This document was agreed upon in principle by the United States and Nicaragua. *See Contadora: Peace Process in Central America*, UN MONTHLY CHRON. vol. 3, 11 (1984). A subsequent draft of a peace treaty, however, was accepted by Nicaragua but rejected by the United States. L.A. Times, Jan. 19, 1985, at 21, col. 1.

137. The Contadora group consists of Colombia, Mexico, Panama, and Venezuela. *See Contadora: Peace Process in Central America*, UN MONTHLY CHRON. vol. 3, 11 (1984).

138. In its counter-memorial to the ICJ, the United States claims that the Contadora Process is the appropriate method for resolving the problems in Central America. Counter-Memorial of the United States (Nicar. v. U.S.), 1984 I.C.J. Pleadings 229 (Counter-Memorial dated Aug. 17, 1984).

139. Treaty of Friendship, Commerce & Navigation, Jan. 21, 1956, 9 U.S.T. 499, T.I.A.S. 4024.

140. The Treaty was ratified by the United States on September 14, 1956 and by Nicaragua on March 17, 1958. It entered into force on May 24, 1958.

141. The preface to the treaty provides: "The United States of America and the Republic of Nicaragua, desirous of strengthening the bounds of peace and friendship traditionally existing between them and encouraging closer economic and cultural relations between their people . . . ." *See* Treaty of Friendship, Commerce & Navigation, *supra* note 139.

142. *See* Treaty of Friendship, Commerce & Navigation, *supra* note 139, at art. 19.

shipping, the primary means of commercial and economic interaction between the two countries, remained undisturbed. The mining of Nicaraguan harbors obstructs navigation and shipping to and from Nicaragua. This affects Nicaragua's trade and commerce not only with other countries, but with the United States as well.

Customary International Law

Treaties and custom are closely related as sources of international law. A rule of law may be contained in a treaty and also considered a part of customary law. As embodied in a treaty, a rule of law is binding only on the parties to that agreement. As a part of customary international law, however, the rule is also binding on other states.[143] The United States is bound, therefore, by rules of international law which, although not agreed to in advance by the parties, are in accord with the constant and uniform practices of states in the international system.

Sovereignty

According to customary international law, the United States has an obligation to respect the political and territorial sovereignty of Nicaragua. In international law, sovereignty denotes independence; the right not to be subject to external forces.[144] The principle of sovereignty guarantees that a state has exclusive jurisdiction within its own domain. This principle was incorporated in the United Nations Charter and reaffirmed as a matter of customary law by subsequent United Nations resolutions.[145]

There are two types of sovereignty protected by international law. Territorial sovereignty involves the exercise of power by a state over its physical or geographical territory. This includes the protection of all land areas, territorial waters, and airspace from outside invasion

143. Report of the International Law Commission to the General Assembly, 2 Y. B. INT'L COMM. 368 (1950).

144. "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State." Island of Palmas (Neth. v. U.S.) 1928 P.C.I.J., *reprinted in* HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 174 (1979).

145. *See* Declaration of the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty, Dec. 21, 1965, U.N.G.A. Res. 2131, [hereinafter cited as Declaration of the Inadmissibility of Intervention]; Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, G.A. Res. 2160 xxi (1965) [hereinafter cited as Prohibition of the Threat or Use of Force].

or interference.[146] Political sovereignty denotes the legal nature of the authority of a state over its domain.[147] More specifically, it protects the right of a state to determine its own form of government. Arguably, the actions of the United States in Nicaragua violate both forms of sovereignty.

Respect for the territorial integrity and sovereign boundaries of a state are longstanding principles of international law.[148] The *Island of Palmas* case, involving the United States and Holland, firmly established the principle that a state has exclusive jurisdiction within its own territory.[149] In *Corfu Channel*,[150] the ICJ ruled that a minesweeping operation conducted by the British navy violated the sovereignty of Albania. The operation was conducted within Albanian territorial waters and against the expressed will of its government.[151] The Court held that, "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations."[152]

The United States has infringed upon Nicaraguan territory in three respects. First, the support of *contra* forces involved in attacks within Nicaragua constitutes an infringement and invasion of Nicaraguan territory. This action is specifically condemned by a 1965

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146. L. HENKIN, R. PUGH, O SCHACHTER, H. SMIT, INTERNATIONAL LAW 256 (1980) [hereinafter cited as HENKIN & PUGH].

147. M. SORENSEN, *supra* note 80, at 313.

148. The principle of territorial sovereignty was outlined by Chief Justice John Marshall in the Schooner Exchange case:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction on it, deriving validity from an external source, would imply a diminuation of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

The Schooner Exchange v. M'Fadden, 11 U.S. 136 (1812).

149. Island of Palmas, *reprinted in* HARRIS, *supra* note 144, at 174.

150. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, *reprinted in* L.C. GREEN, INTERNATIONAL LAW THROUGH THE CASES 228 (1978).

151. This ruling was one in a series of rulings involving a rather complex conflict between Great Britain and Albania. On May 15, 1946, Albanian coastal batteries fired upon British warships passing through the Corfu Channel, in Albanian territorial waters. On October 22, 1946, two British warships passing through that Channel struck mines, which caused damage to the vessels and loss of life among the crews. On November 12-13, 1946, British ships, without Albanian consent, swept for mines in that part of the Corfu Channel which lay in Albanian waters. The ICJ considered the issues of Albania's responsibility for the explosions and the resulting damage, and also the legality of British actions in sweeping the Channel. The Court, by eleven votes to five, held Albania responsible for the explosions and the ensuing damage. It also unanimously ruled that the United Kingdom had violated Albanian sovereignty in sweeping her territorial waters. Perspective, *International Court of Justice*, UN MONTHLY CHRON. Vol. 20, No. 11, Dec. 1983 at 47.

152. Corfu Channel, *reprinted in* GREEN, *supra* note 150, at 236.

United Nations resolution on the illegality of intervention in the domestic affairs of a foreign country. This resolution, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, prohibits the direct or indirect use of force against the territorial integrity of any state.[153]

Second, mining Nicaraguan harbors is a violation of Nicaraguan territorial waters.[154] If in *Corfu Channel* the ICJ found that *sweeping* the territorial waters of another country for mines violated the principle of sovereignty, then logically it would follow that *placing* mines in the waters of another country is an even greater violation this principle.

Third, the unauthorized intrusion by United States military airplanes into Nicaraguan airspace violates Nicaragua's territorial airspace.[155] Legally, airspace forms an integral part of the territory of a state. Such airspace falls under the exclusive jurisdiction of the subjacent state.[156] According to one jurist, even a temporary incursion, without permission, into the airspace of another state constitutes a

153. Declaration on the Inadmissibility of Intervention, *supra* note 145.

154. The harbors and ports of a state have long been considered a part of her territory. "As in Roman law, ports, harbours and roadsteads, dependencies of maritime territory, form part of the domain of the state in nearly all modern countries and are subject to a right of sovereignty." R. HIGGINS & C.J. COLOMBOS, INTERNATIONAL LAW OF THE SEA, 2d ed. 113, *reprinted in* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 259 (1965). In addition, articles 1 and 2 of the 1958 Territorial Sea Convention provide that a coastal state has the same sovereignty over its territorial sea and over the airspace, seabed, and subsoil thereof, as it has with respect to its land territory. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. 5639.

155. In the Security Council, United States Ambassador to the United Nations, Jeane Kirkpatrick, openly acknowledged that the United States engages in regular overflights of Nicaragua to obtain intelligence information for the *contras* attacking Nicaragua. U.N. SCOR S/PV 2335, Mar. 22, 1982.

156. This principle, first developed after World War I, was affirmed by the Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1951, 15 U.N.T.S. 296, *reprinted in* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE, 503-04 (1981). The Chicago Convention provides:

> Article 1. The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.
> Article 2. For the purpose of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.
> Article 3(b). Aircraft used in military, customs and police services shall be deemed to be state aircraft.
> Article 3(c). No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

Id.

violation of its territorial integrity.[157]

Regarding political sovereignty, the U.N. Resolution of the Prohibition of the Threat or Use of Force affirms the right of every nation, whether large or small, to freely choose without external interference, its political, social, and economic systems.[158] This right of self-determination was incorporated in the United Nations Charter by the Declaration on Friendly Relations in 1970.[159] The OAS recognized the diversity of ideologies in the international system and accordingly adopted measures protecting it. A declaration, passed in 1973, guarantees a state the right of self-determination regardless of its political and ideological persuasions.[160] Hence, there are no legal prohibitions against a regime adopting a Marxist orientation as Nicaragua has done. The goal of the *contras*, the overthrow of the present Nicaraguan government, conflicts with the principles of self-determination. Thus, support of the *contras* by the United States constitutes a violation of Nicaragua's sovereignty.

Proof that the United States is attempting to interfere in the do-

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157. R. HIGGINS, THE LEGAL LIMITS TO THE USE OF FORCE 183 (1962).

158. Prohibition of the Threat or Use of Force, *supra* note 145.

159. The provisions of the Declaration on Friendly Relations concerning self-determination provide:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.

See supra note 73.

160. This resolution, Principles Governing Relations Among the American States, was adopted by the General Assembly of the OAS on April 15, 1973. It reads in part:

> 1. That in accordance with the principles of the Charter of the Organization, and especially with those of mutual respect for sovereignty, the self-determination of peoples, and the juridicial equality of states, every state has the right to adopt, with complete independence, its own system of government and economic and social organizations.
>
> 2. That, under the Charter, plurality of ideologies is a presupposition of regional solidarity, which is based on the concept of cooperation freely accepted by sovereign states, to achieve common objectives of maintenance of peace and understanding among them for the sake of their vigorous and dynamic development in the economic and social fields and in those of education, science, and culture.
>
> 3. That plurality of ideologies in relations among the member states implies the duty of each state to respect the principles of nonintervention and self-determination of peoples and the right to demand compliance with those principles by the other states.

Principles Governing Relations Among the American States, *reprinted in* F.V. GARCIA-AMADOR, *supra* note 106, at 79.

mestic affairs of Nicaragua was provided in a statement by President Reagan in March of 1984. In an interview with reporters, the President indicated that the goal of the United States in supporting the *contras* was to force a change in the internal policies of Nicaragua. The President stated: "We have made it plain to Nicaragua — made it very plain — that this will stop when they keep their promise and restore a democratic rule."[161] From a human rights perspective, the desire to institute democracy in Nicaragua is understandable. From an international law perspective, however, such a desire violates Nicaragua's sovereignty.

Freedom of the Seas

By mining the harbors of Nicaragua, the United States is doing more than harassing the government of Nicaragua and damaging its fishing trawlers. The actions of the United States infringe upon the right of all nations to enjoy the freedom of the seas. The concept that the seas are free and open to all countries and thus can not be made subject to the control of any individual country is one of the oldest enduring principles of international law. Developed in the seventeenth century by the Dutch jurist Hogo Grotius, it is based upon the belief that the oceans are not divisible, but are subject to the common ownership of mankind.[162] Freedom of the seas was largely a matter of customary international law until codified and developed by the 1958 United Nations Conference on the Law of the Sea.[163] Insofar as the Conventions codify customary law, they reflect principles that are binding on all states including those which have not

161. N.Y. Times, Mar. 28, 1984, at A1, col. 8. In a press conference on February 21, 1985, President Reagan acknowledged that the United States supported the removal of the Nicaraguan government: "You can say we're trying to oust Sandinistas . . . ." L.A. Times, Feb. 22, 1985, at 1, col. 5.

162. H. GROTIUS, DE JURI BELLI AC PACIS, *reprinted in* M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 501 (1965).

163. The 1958 Law of the Sea Conference adopted four conventions: Convention of Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969 [hereinafter cited as the Fishing on the High Seas Convention]; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578 [hereinafter cited as the Continental Shelf Convention]; Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 [hereinafter cited as the Territorial Sea Convention]; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 [hereinafter cited as the High Seas Convention]. A more comprehensive and inclusive Law of the Sea Treaty was signed in 1982 in Kingston, Jamaica. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (1982) [hereinafter cited as the 1982 Convention].

ratified them.[164]

Freedom of the seas traditionally has meant the freedom of their usage for purposes such as navigation, fishing, trade, travel, and war.[165] Moreover, the concept stands for the proposition that in peacetime vessels on the open seas may not be disturbed.[166] The right to unobstructed navigation of the open seas extends to passages through territorial waters. The 1958 Territorial Sea Convention and the 1982 Law of the Sea Convention provide that "ships of all States . . . enjoy the right of innocent passage through the territorial sea."[167] Passage includes navigation through the territorial sea for the purpose of "proceeding to or from internal waters or a call at such roadstead or port facility."[168]

The customary right of innocent passage through territorial waters includes the freedom of access to ports.[169] This customary rule of international law derives from the 1923 Statute on the International Regime of Maritime Ports, which established the principle of open access to ports by foreign merchant vessels.[170] The principle permits greater latitude in the flow of international trade and commerce, and protects against unwarranted discrimination in the treatment ac-

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164. The 1982 Convention, *supra* note 163, was signed in December 1982 by more than 120 countries. The United States did not sign because it found unacceptable certain provisions regarding deep seabed mining. The United States did announce, however, that it would recognize essentially all the other provisions as customary international law and thus binding on all states. L. SOHN & K. GUSTAFSON, THE LAW OF THE SEA, xix-xx (1984). *Cf.* Gamble & Frankowski, *The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning*, 21 SAN DIEGO L. REV. 491 (1984). The authors warn that because of the comprehensive and heterogeneous nature of the Convention, its provisions differ in the degree to which they codify existing customary international law.

165. Today these freedoms include, but are not limited to: (1) freedom of navigation; (2) freedom of overflight; (3) freedom of fishing; and (4) freedom to lay submarine cables and pipelines. High Seas Convention, *supra* note 163, at art. 2.

166. Article 88 of the 1982 Convention provides: "The high seas shall be reserved for peaceful purposes." 21 I.L.M. 1261, 1287 (1982). Article 301 of the same Convention states:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Id. at 1326.

167. *See* Territorial Sea Convention, *supra* note 163, at art. 14; 1982 Convention, *supra* note 163, at art. 17.

168. 1982 Convention, *supra* note 163, at art. 18.

169. L. SOHN & K. GUSTAFSON, *supra* note 164, at 79-80.

170. The 1923 Statute was relied upon by an international tribunal in arbitration between the Saudi Arabian Government and the Arabian American Oil Company as follows: "According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require." Saudi Arabia v. Arabian American Oil Company, Award of August 23, 1938, 27 INT'L L. REP. 117, 212 (1963).

corded to ships of different states.[171]

According to the principle of innocent passage, the planting of mines by the United States in Nicaraguan harbors violates the customary right of freedom of the seas. The United States has a legal obligation not to interfere with international navigation and commerce. The obstruction of Nicaraguan harbors, the damage to Nicaraguan and foreign commercial vessels, and the resulting decline in the passage of vessels to and from Nicaragua, all constitute violations by the United States of its international responsibilities.

The mining of Nicaraguan harbors may also be considered a blockade, a measure traditionally lawful only during wartime. Interference with commercial maritime traffic, in the absence of a state of war between countries, is illegal under international law standards.[172] The use of mines to interfere with commercial maritime traffic is illegal at *all* times under these standards. Parties to the Second Hague Peace Conference in 1907 agreed to forbid the laying of "automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."[173] The United States cannot justify the minings by claiming its activities were aimed only at preventing military shipments to and from Nicaragua.[174] The use of automatic contact mines is lawful only where discrimination between legitimate and illegitimate objects of sea warfare is possible.[175] The mines used in this operation were not of the type which could differentiate between a Soviet freighter carrying weapons and a Japanese freighter carrying manufactured goods.[176]

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171. "[I]n time of peace, commercial ports must be left open to international traffic. The liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes, embark and disembark their passengers." R. HIGGINS & C.J. COLOMBOS, *supra* note 154, at 259.

172. The 1921 *Wanderer* case explicates the law of the sea on the right to impede or interfere with foreign ships in peacetime. The Anglo-United States Arbitral Tribunal held that "the fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement." G. SCHWARZENBERGER, INTERNATIONAL LAW 595 (1968).

173. Convention Relative to the Laying of Automatic Submarine Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541.

174. According to one report, *contra* forces announced as early as January 8, 1984 that they were mining Nicaraguan ports to prevent the arrival of weapons from Cuba and the Soviet Union. *Explosion over Nicaragua*, *supra* note 2, at 19.

175. G. SCHWARZENBERGER, *supra* note 172, at 417.

176. This is evidenced by the fact that the CIA mines damaged vessels from both of these countries. For a detailed account of the type of mines used in the operation, see *Explosion over Nicaragua*, *supra* note 2, at 20.

By hindering or obstructing free access to Nicaraguan harbors, the United States is engaging in an activity tantamount to a pacific blockade.[177] Such a blockade is now considered a violation of international law.[178]

The Cuban Missile Crisis in 1962 is the most recent international incident involving a blockade.[179] Although the United States called its actions a "quarantine" rather than a blockade,[180] its purposes in intercepting and interfering with shipping to and from Cuba resemble those behind the mining of Nicaraguan harbors. The legality of the quarantine under international law has been the subject of much debate by legal scholars.[181]

Proponents of the United States' actions justify the quarantine on the grounds that it was imposed pursuant to the collective judgment and recommendation of the OAS under the terms of the Rio

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177. A pacific blockade is a blockade during a time of peace.

178. "In view of the prohibition contained in article 2(4) of the United Nations Charter, pacific blockade is now an obsolete institution of international law." M. SORENSEN, *supra* note 80, at 755. Even when the procedure of pacific blockade was generally acceptable in international law, the United States recognized that it did not permit interference with vessels of a third state, but only with vessels of the blockading and the blockaded states. An 1858 Senate resolution asserted:

> American vessels on the high seas, in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong, and therefore any visitation, molestation, or detention of such vessels by force, or by the exhibition of force, on the part of a foreign power, is in derogation of the sovereignty of the United States.

2 J. MOORE, INTERNATIONAL LAW DIGEST 946 (1906). A pacific blockade, therefore, is unlawful if it interferes with vessels of a third country. This principle can certainly be applied to the United States' mining of Nicaraguan ports which damaged vessels from Japan, Holland and other countries.

179. In 1962 the Soviet government began the construction of several missile sites in Cuba. The United States requested the Soviet Union to stop these activities in Cuba and to dismantle the existing sites. Simultaneously, the United States ordered its forces to intercept the delivery to Cuba of certain categories of military equipment. To make the action effective, the United States declared its intention to stop and search vessels proceeding to Cuba. The Soviet Union and certain other states protested the United States' measures, but the OAS adopted a resolution calling on all members to take collective action to help enforce them. The dispute was finally resolved in negotiations between the United States and the USSR whereby the United States agreed to end the quarantine in return for the Soviet removal of the missile equipment. *See generally* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 443 (1965).

180. Sorensen maintains that the Cuban quarantine was not a pacific blockade because it applied to vessels or crafts of third states. Its purpose was to prevent Soviet shipping to Cuba rather than to completely cut off Cuba from the rest of the world. M. SORENSEN, *supra* note 80, at 757.

181. For a discussion of the legality of the quarantine by those who thought it lawful, see generally Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L., 515 (1963); Christol and Davis, *Maritime Quarantine: The Navel Interdiction of Offensive Weapons and Associated Material to Cuba*, 1962, 57 AM. J. INT'L L. 525 (1963); McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963). For a discussion by those who thought the quarantine unlawful, see generally Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963); Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT'L L. 175, 197-203 (1967).

Treaty.[182] The proponents argue that the quarantine did not contravene article 2(4) of the UN Charter because it was a measure adopted by a regional organization to promote peace and security in conformity with the provisions of chapter VIII of the Charter.[183]

Critics of the quarantine claim that it represented an effort to enforce a settlement of the dispute without any prior attempt at resolution by negotiation.[184] Additionally, critics argue that the quarantine forcibly interfered with the rights of states to freely navigate the high seas in a time of peace.[185]

Whether the quarantine by the United States violated international law remains the source of much dispute. What is clear, however, is that the United States' justification of the Cuban quarantine cannot be used to justify the mining of Nicaraguan harbors. The actions of the United States in the Cuban crisis were carried out in accordance with the collective consent of the OAS under the provisions of the Rio Treaty.[186] The actions of the United States in Nicaragua, however, are unilateral measures taken without the consent of the OAS, and in contravention of the expressly stated position of the UN.[187]

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182. *See infra* notes 207-08 and accompanying text.

183. Chapter VIII of the UN Charter allows regional organizations to take measures to maintain international peace and security providing such measures are consistent with the purposes and principles of the Charter. Thus, regional organizations can resort to the use of individual or collective self-defense as provided in article 51 of the UN Charter. United States Legal Advisor Leonard Meeker advanced these arguments to justify the actions of the United States. *See* Meeker, *supra* note 181.

184. M. SORENSEN, *supra* note 80, at 757.

185. *Id.*

186. The Council of the OAS met on October 23, 1962 to discuss the United States' request. It adopted a resolution recommending:

> [t]he member states, in accordance with Article 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.

47 DEP'T ST. BULL. 723 (1962).

187. Resolution 530, adopted in May, 1983, by the UN Security Council, reaffirmed "the right of Nicaragua and of all the other countries of the area to live in peace and security, *free from outside interference*," 20 UN MONTHLY CHRON. 35 (No. 7, July 1983) (emphasis added).

APPLICATION OF THE PRINCIPLES OF SELF-DEFENSE

Introduction

Having applied the relevant legal principles — treaties and custom — to the facts of this conflict, it is evident that the actions of the United States in Nicaragua violate international law. There remains, however, the issue of whether these actions, despite their illegal nature, are justified under the generally recognized rights of individual and collective self-defense in international law.

Self-defense stands as an exception to the general prohibition against the use of force in international law. The purpose of the right of self-defense is to "justify action, otherwise illegal, which is necessary to protect certain essential rights of the state against violation by other states."[188] Grotius stated that the origin of the right of self-defense was in "the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor."[189]

The modern formulation of the right of self-defense derives in large part from the *Caroline Case*.[190] In 1837, United States Secretary of State Daniel Webster sent a protest note to the British government, disputing Britain's claim that its destruction of an American vessel, the *Caroline*, was justified by the right of self-defense. In the note, Webster outlined the general scope of the right of self-defense. He stated that the British government must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[191] Moreover, according to Webster, the British had to prove they "did nothing unreasonable and excessive; since the act justified by the necessity of self-defense, must be limited to that necessity, and kept clearly within it."[192]

The *Caroline Case* recognized two important principles which constitute the basis of most modern formulations of the right of self-defense. The first principle is that the exercise of self-defense may be justified only in cases where there is a threatened or actual armed attack. Professor Brownlie has noted that in state practice, both before and after World War II, "resort to force by virtue of the right of self-defense is almost without exception associated with the idea

188. D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 270 (1958).

189. H. GROTIUS, DE JURE BELLI AC PACIS 172 (F. Kelsey trans. 1925).

190. The case arose out of the Canadian Rebellion of 1837. An armed force, without the support of the United States government, enlisted the assistance of a number of American citizens in raiding Canadian territory. The force was supplied by an American ship, the *Caroline*. On the night of December 29, British forces crossed the Niagara River, seized the *Caroline* which was then in an American port, set fire to it and sent it over Niagara Falls. Two American citizens were killed. The legality of the British acts was questioned in correspondence between the United States and British Governments. D. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 676 (1979).

191. *Id.* at 677.

192. *Id.*

of reaction against the use of force."[193] Many scholars support this narrow interpretation of the self-defense privilege.[194]

The second principle limits the international legal right of self-defense by the requirement that the force employed must be proportionate to the intensity of the challenge and the immediacy of the danger.[195] Such a requirement injects a degree of protection from, and regulation of, excessive use of force in the international system.

Closely related to the concept of individual self-defense is the concept of collective self-defense. Under international law, collective measures may be initiated by a group of countries in protection of the legal rights of individual states. The requirements of the right of collective self-defense are: (1) that each participating state have an individual right of self-defense, and (2) that an agreement exists between the participating states to exercise their rights collectively.[196] The purpose of a system of collective self-defense is to deter aggressive behavior by insuring that, if an armed conflict occurs, other states will align themselves with the victim against the law-breaker or aggressor.[197]

Self-Defense Under the U.N. Charter

The principle exception to the general prohibition on the use of force in article 2(4) of the UN Charter is contained in article 51 of the Charter.[198] This article permits a country to act in either individ-

193. Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. Y.B. INT'L L. 182, 183 (1962).

194. "It is important to emphasize the narrow nature of self-defense, as forceful self-help in reply to a forceful denial of rights." Higgens, *The Legal Limits to the Use of Force by Sovereign States United Nations Practice*, 37 BRIT. Y.B. INT'L L. 269, 298 (1962). This view is shared by Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 784 (1948) who states that "self defense . . . is self-help against a specific violation of the law, against the illegal use of force, not against other violations of the law." See also M. SORENSEN, *supra* note 80, at 766-67, who maintains that the contemporary view of the UN and a majority of its members is that a state may act in individual self-defense only if an armed attack occurs against it. But see D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 24 (1958) who believes that certain international acts justify action in self-defense even if those acts do not involve force.

195. "The criterion by which the legality of the measures used in self-defense will be judged is that of proportionality." D. BOWETT, *supra* note 188, at 261.

196. Bowett, *Collective Self-Defense Under the Charter of the United Nations*, 32 BRIT. Y.B. INT'L L. 130, 139-40 (1955-56).

197. Hans Morgenthau writes: "It is the purpose of collective security to make war possible by marshalling in defense of the status quo such overwhelming strength that no nation will dare to resort to force in order to change the status quo." H. MORGENTHAU, POLITICS AMONG NATIONS 334 (1948).

198. Article 51 reads:

ual or collective self-defense if an armed attack occurs against a member of the UN. There has been much discussion concerning the interpretation of this article.[199] One position asserts a narrow interpretation. Hence, the words "if an armed attack occurs" are construed to mean that an armed attack must have already occurred before the use of force in self-defense is justified.[200] Consequently, there is no right of anticipatory self-defense in the case of a threatened attack.[201]

The contrary view is that article 51 was not intended to limit the circumstances under which self-defense may be exercised. Under this approach, a state may resort to self-defense when a violation of either the prohibition against force, or the rights of territorial integrity, political independence, or economic freedom occurs.[202] Thus, as soon as an essential right has been compromised, or even prior to that time, the affected state may act in anticipatory self-defense against the aggressor. Recent trends in UN practices suggest adoption of a restrictive view of self-defense; a trend thus indicative of modern international law.[203]

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

199. *See supra* note 194.

200. Sorensen writes that under the Charter" . . . there is no room for self-defense even if the most fundamental and vital rights of the state have been endangered or violated in a manner which does not constitute an armed attack." M. SORENSEN, *supra* note 80, at 767.

201. "It is submitted, however, that anticipatory self-defense is incompatible with the Charter. Article 51 is an exception to article 2(4), and it is a general rule of interpretation that exceptions to a principle should be interpreted restrictively, so as not to undermine the principles." M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 243 (1967).

202. D. BOWETT, *supra* note 194, at 24 (1958).

203. Sorensen cites several instances where the UN gave its backing to the restrictive interpretation and refused to regard the offensive use of armed force as self-defense. These include the hostilities between Pakistan and India in 1948, the Suez Canal conflict in 1956, and the Tunisian question in 1958. M. SORENSEN, *supra* note 80, at 767. Many commentators argue, however, that in the nuclear age allowing the aggressor to strike the first blow would completely destroy the state complying with international law. Professor Friedman claims that with the advent of nuclear rockets and missiles "the right of self-defense must probably now be extended to the defense against clearly imminent aggression, despite the apparently contrary language of article 51 of the Charter." Friedman, *The Changing Structure of International Law, reprinted in* HENKIN & PUGH, *supra* note 146, at 932. It would appear, however, that anticipatory use of self-defense will be justified only in extreme cases. The *Caroline* definition of self-defense which requires an "instant and overwhelming" necessity "leaving no choice of means and no moment for deliberation" is still valid. According to Professor Rohlik, the permissible standards for justifying anticipatory use of force in self-defense are very stringent:

Self-Defense Under the O.A.S. Charter and the Rio Treaty

Article 51[204] of the UN Charter authorizes regional organizations to deal with matters related to the maintenance of peace and security in their regions. The OAS has the authority, by virtue of articles 18 and 20 of its Charter, to prohibit the use of force or other types of intervention in the Western Hemisphere.[205] The only exception to these broad prohibitions is provided by article 22, which states that "[m]easures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in [a]rticles 18 and 20."[206] One such measure is the Inter-American Treaty of Reciprocal Assistance of 1947 (the Rio Treaty),[207] which provides for a system of collective self-defense among the American states.[208] Article 3 of the Rio Treaty establishes the principle that an armed attack by any state against an American state shall be considered an attack against all American states. The parties to the Rio Treaty contracted to "assist in meeting the attack in the exercise of the inherent right of individual or collec-

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The danger of obliteration of the threatened state must be real, the threatening state must be in a position to obliterate the threatened state, the threatening state must have the means to obliterate the threatened state, and there must be sufficient evidence to support the belief of the intended victim that the threatening state made the decision to attack.

Rohlik, *Remarks to Self-Defense and Intervention: A Reaction to Pending Law and Civil War in the Modern World*, 6 GA. J. INT'L & COMP. L. 395, 419 (1977).

204. Article 52 provides:

1. Nothing in the present Charter precludes the existence of regional arrangements of agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference to the Security Council.

205. *See supra* notes 106-07 and accompanying text.

206. OAS CHARTER, art. 22.

207. Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838.

208. The preamble of the Rio Treaty states its purpose as assuring peace "through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American State, and in order to deal with threats of aggression against any of them." *Id.*

tive self-defense recognized by article 51 of the UN Charter."[209] Article 3 also endorses the right of an individual state to use force, at the request and in defense of a state or states directly attacked, until such time as the Organ of Consultation is able to meet and discuss what collective measures should be taken by the OAS.[210]

The Rio Treaty also allows the use of force in self-defense under article 6 if:

> . . .the inviolability or the integrity of territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America.[211]

Article 6 would thus appear to justify the use of force in defense of another country whose sovereignty is violated by "aggression which is not an armed attack." Such a self-defense privilege is qualified, however, by the remainder of article 6 which allows force to be employed only with the approval of the Organ of Consultation.[212]

Thus, the Rio Treaty permits the use of self-defensive force in two situations. Under article 3, individual or collective self-defense may be taken pursuant to article 51 of the UN Charter; under article 6, the self-defense privilege may be asserted only by a decision of the Organ of Consultation.

The Legal Position of the United States

In a radio address to the nation, President Reagan outlined the position of the United States in Central America:

> We support the elected Government of El Salvador against Communist-backed guerrillas who would takeover the country by force. And we oppose the unelected Government of Nicaragua, which supports those guerrillas with weapons and ammunition . . . . Our neighbors in the Americas are important to us, and they need our help . . . . [W]e're helping our neighbors create a defensive shield to protect themselves from Communist intervention.[213]

Essentially, the United States' legal position is that its actions in Nicaragua

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209. *Id.* at art. 3(1).

210. *Id.* at art. 3(2). The Organ of Consultation is a body of the OAS consisting of the foreign ministers of each member country. The Organ convenes to consider urgent problems of common interest to the American states or in cases of armed attack or other threats to international peace and security. The purpose of the Organ is to maintain peace, settle disputes and resist armed attacks in the Americas. *See* ORGANIZATION OF AMERICAN STATES, A HANDBOOK 12 (1977).

211. Rio Treaty, art. 6, *see supra* note 207.

212. [T]he Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

Id. at art. 6.

213. Radio Address to the Nation, 19 WEEKLY COMP. PRES. DOC. 1127-28 (Aug. 13, 1983).

> are justified under the principle of collective self-defense.[214] According to the United States, article 51 of the UN Charter "precludes impairment of the inherent right of individual and collective self-defense."[215] The United States claims that its actions against Nicaragua are in response to a request for help from the government of El Salvador, which is engaged in a civil war with Nicaraguan-supported rebels. According to the United States, Nicaragua's act of aggression, directed against El Salvador, activates the collective defense measures incorporated in the UN Charter and the Rio Treaty. The United States, therefore, is obligated to come to the defense of a fellow member of this collective security system.

Flaws in the Legal Position of the United States

The position of the United States, that its use of force against Nicaragua is legal under the principle of collective self-defense, is indefensible under international law. There are three defects in the argument. First, the actions of the United States in Nicaragua are unilateral, not collective. Funding and supplying *contra* forces without the support, participation, or approval of the UN or the OAS can hardly be considered a collective action. Second, the United States is obligated to settle all disputes by peaceful means.[216] The use of force, prior to exhausting all non-coercive means of settlement, violates the treaty commitments of the United States.[217] Third, the United States' use of force against Nicaragua does not adhere to the strict requirements of necessity and proportionality which form an integral part of the right of self-defense.[218]

As to the first of these three flaws, acts of collective self-defense must be authorized by the participating members of the collective system. Article 51 of the UN Charter allows the use of individual or collective self-defense "until the Security Council has taken measures necessary to maintain international peace and security."[219] The exercise of collective self-defense, however, is regulated by the requirement that its application must be immediately reported to the Security Council.[220] The covert nature of the United States' support

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214. Allan Gerson, Special Assistant to the UN Ambassador, writes:
> In Central America, the United States is responding to the request of the Government of El Salvador to stop Nicaragua's flow of arms, training and command support to Salvadoran insurgents. Under international law, such activity is tantamount to an armed attack in violation of the United Nations Charter and permits individual and collective self-defense measures.

Gerson, *U.S. Acts Lawfully*, N.Y. Times, May 14, 1984, at 24, col. 1.

215. Counter-Memorial of the United States, *supra* note 138, at 219.

216. *See supra* notes 133-35 and accompanying text.

217. *Id.*

218. *See supra* notes 190-92 and accompanying text.

219. U.N. CHARTER art. 151, *supra* note 198.

220. *Id.*

to *contra* forces has prevented the United States from officially acknowledging its activities, let alone reporting them to the Security Council. Additionally, El Salvador has not requested, nor informed the Security Council of a need for collective self-defense measures.[221] The United States, therefore, cannot justify the use of force under article 51 without the authorization of the Security Council.[222]

Similarly, article 3 of the Rio Treaty requires that, when collective measures are undertaken at the request of a state "directly attacked," the Organ of Consultation of the OAS "shall meet without delay" to agree upon the measures to be taken.[223] Article 6 specifically prohibits the use of force in collective self-defense against indirect aggression *without* the approval of the Organ of Consultation.[224] In the present situation, Nicaragua has neither invaded nor directly attacked El Salvador. However, the supplying of arms to Salvadoran rebels constitutes indirect aggression within the scope of article 6. According to the Rio Treaty, therefore, measures taken by the United States in collective self-defense of El Salvador must be authorized by the OAS.[225] By using covert force against Nicaragua, the United States has disregarded the lawful collective enforcement procedures of the OAS system.

In contrast, during the Cuban missile crisis, the United States enjoyed the full support of the OAS. The importance of OAS authorization to the legality of the actions of the United States during that conflict was recognized by Attorney General Robert Kennedy. He stated that "[i]t was the vote of the Organization of American States that gave a legal basis for the quarantine. . . . It. . .changed

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221. All discussions by the Security Council of the situation in Central America have been at the request and initiation of Nicaragua. *See* UN CHRON., vol. 20, Nos. 5, 7, and 10 (1983).

222. Professor Bowett writes:

> The individual members cannot on the one hand delegate primary responsibility for the maintenance of international peace and security to the Security Council (Art. 24), and on the other claim this right of unilateral action to support any state which they consider to be acting in self-defense. This sort of freedom of alliance cannot stand together with a system of collective security as centralized as the United Nations Charter. The Charter clearly intends that the prohibition of Art. 2(4) will admit only the minimum exception of self-defense, strictly construed, and subject to the overriding authority of the Security Council.

Bowett, *Collective Self-Defense Under the Charter of the United Nations*, 32 BRIT. Y.B. INT'L L. 130, 139 (1955-56).

223. Rio Treaty, *supra* note 210, art. 3(2).

224. Rio Treaty, *supra* note 211, art. 6.

225. The members of the Organization of American States have condemned resort to the threat or use of force and have obligated themselves to settle all disputes peacefully. Thus, under that organization, armed sanctions pursued as reprisals to vindicate the law are absolutely prohibited unless taken collectively under the authority of the O.A.S.

Thomas, *Non-Intervention and Public Order in the Americas*, PROC. AM. SOC. INT'L L. 72, 74 (1959).

our position from that of an outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their positions."[226]

The second flaw in the position of the United States is its use of force in attempting to resolve the conflict with Nicaragua, prior to exhausting all peaceful means of settlement. Article 2 (3) of the UN Charter calls on all members to "settle their international disputes by peaceful means and in such manner that international peace and security, and justice are not endangered."[227] The Charter further provides that parties to a conflict must first seek a solution to their dispute through the settlement procedures contained in article 33.[228] Similar provisions regarding the pacific settlement of disputes are contained in the OAS Charter.[229] These obligations are also recognized by a number of treaties to which the United States is a signatory.[230]

The United States has violated its obligations under international law by failing to pursue strictly peaceful means of resolving its differences with Nicaragua. In 1981, President Reagan demanded that the flow of arms from Nicaragua to Salvadoran rebels be halted.[231] Attempts to resolve the situation proved unsatisfactory to both countries.[232] Rather than continuing to seek a diplomatic resolution, the United States began delivering covert military assistance to the *contra* forces.[233]

The policies of the United States in Nicaragua have been directed

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226. R. KENNEDY, THIRTEEN DAYS 121 (1969).

227. U.N. CHARTER art. 2(2).

228. Article 33(1) provides: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

229. Article 22 provides: "All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations." Article 24 further provides: "The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time."

230. *See* Convention to Fulfill Existing Treaties, *supra* note 133, art. 4; Anti-War Treaty of Non-Aggression and Conciliation, *supra* note 127, art. 6.

231. *See U.S. Policy Toward Nicaragua*, CONG. DIG., Nov. 1984, at 261.

232. Thomas Enders, assistant secretary of state for inter-American affairs, went to Nicaragua in August 1981 to meet with officials of the Sandinista government. This meeting, however, failed to achieve a solution to the Nicaraguan problem. *See* L.A. Times, Mar. 3, 1985 at 10, col. 5.

233. *Id. See also Explosion over Nicaragua, supra* note 2, at 18.

more toward military pressure than diplomatic settlement under the Reagan administration. Between 1981 and 1984 the United States spent more than $80 million on military aid to the *contra* forces.[234] During that same period, no high level contact or negotiation between the two countries took place.[235] It would appear, therefore, that the United States has decided to pursue a policy of force rather than negotiation in Nicaragua. Such a policy violates the duty of the United States to resolve international disputes through peaceful means.

The third defect in the argument of the United States is that its use of force against Nicaragua is far greater than that allowed under the international principles of collective self-defense. The requirements set forth in the *Caroline* case indicate that the amount of force employed must be proportional to the intensity of the challenge and the immediacy of the danger.[236] The organization and support of *contra* forces attacking Nicaragua fails to meet these proportionality requirements. The *contras* are engaged in actual combat with Nicaragua, which has resulted in serious violations of Nicaragua's sovereignty. Their level of aggression far exceeds that employed by Nicaragua in its aid of the Salvadoran rebels. The use of force by the United States in collective self-defense would be legally justified only if Nicaraguan assistance to Salvadoran rebels was serious enough to constitute an "armed attack."[237]

Lawful Approach to Resolving the Nicaraguan Problem

The original goal of the United States, to prevent the flow of arms from Nicaragua to rebels in El Salvador, is a legitimate objective under international law. The unilateral use of covert force, however, is not a legitimate method of achieving that goal. Although international law does not require the United States to stand idly by while Nicaragua supplies Salvadoran rebels, it does require certain public procedural steps.

The lawful approach to resolving the conflict between these two countries requires the invocation of specific regional peacekeeping procedures.[238] Article 52 of the UN Charter[239] and article 23 of the OAS Charter[240] provide that efforts to resolve international disputes

234. *Explosion over Nicaragua, supra* note 2, at 16.
235. L.A. Times, Jan. 19, 1985, at 1, col. 2.
236. *See supra* notes 190-91.
237. *See supra* note 194 and accompanying text which details the relatively limited scope of the self-defense privilege in international law.
238. "The question of Central America should be resolved within the context of the region and by peaceful means through negotiations." Statement of Secretary-General Javier Perez de Cuellar, Dec. 21, 1983 *reprinted in* 21 UN CHRON., vol. 3, 9 (1984).
239. U.N. CHARTER art. 52, *see supra* note 204.
240. O.A.S. CHARTER art. 23, *see supra* note 106.

between American states must originate in the region in which the dispute arose. Thus, if Nicaragua's action in supporting Salvadoran rebels violates article 18 of the OAS Charter,[241] the appropriate response by the United States would be to call for a convocation of the Organ of Consultation under the Rio Treaty. This body could assess the accuracy of the United States' charges and encourage Nicaragua to comply with article 18.[242] If Nicaragua fails to abide by the Organ of Consultation, the Organ may impose economic sanctions under the authority of article 6[243] until the violations cease.[244]

Should efforts to resolve this conflict within the regional framework fail, the United States is obligated to pursue a peaceful resolution of the matter through article 33 of the UN Charter which specifies that countries involved in a dispute shall first seek a solution by peaceful means.[245] If the parties cannot settle their differences through the measures indicated in article 33,[246] they must refer their dispute to the Security Council.[247] These provisions clearly require that in the absence of a negotiated or diplomatic settlement, the United States must bring its grievances against Nicaragua to the Security Council.[248] Articles 34 and 36 delegate to the Security Council the authority to investigate any dispute or situation giving rise to "international friction" and to recommend appropriate methods of adjustment.[249] These methods involve non-forceful measures, such as economic and diplomatic pressure by member states against

241. O.A.S. CHARTER art. 18, *see supra* note 106.
242. *Id.*
243. Rio Treaty, art. 6, *see supra* note 207.
244. Such a procedure was followed by the Venezuelan government in July 1960, when it requested a convocation of the Organ of Consultation to assess the acts of intervention and aggression by the Dominican Republic against Venezuela. The Organ of Consultation convened to investigate Venezuela's charge and subsequently concluded that the events came within article 6 of the Rio Treaty. The Consultation voted on behalf of all member states to break off diplomatic and economic relations with the Dominican Republic. Relations with the Dominican Republic were resumed two years later after a special committee of the OAS concluded that the Dominican Republic was no longer a danger to the peace and security of the Americas. 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 793-96 (1971).
245. U.N. CHARTER art. 33.
246. *Id.*
247. U.N. CHARTER art. 37(1).
248. Under article 51, *see supra* note 198, the dispute must still be brought to the Security Council even though the United States has already exercised its right of collective self-defense against Nicaragua. Article 51 requires that those states exercising the right of self-defense immediately report to the Security Council. The Security Council has complete discretion to take any action it deems necessary to maintain or restore international order.
249. U.N. CHARTER arts. 34 & 36.

the aggressor.[250] If these measures prove inadequate, the Security Council can take military action designed to maintain international order by deploying the armed forces of member states.[251]

International Law Implications of the Actions of the United States

In light of its recent actions in Nicaragua, the United States must make some basic decisions concerning the role it is to play in the world community. The choice is between pursuing policies designed to support and defend international law, or violating that law by flouting international principles such as the prohibition of the threat or use of force.

The path the United States decides to pursue will have important implications for the future of international law. As one of the leading supporters of the effort to construct a viable legal order, the United States is viewed as a role model for international behavior. Higher standards are expected of the United States because of its preeminent position in the international order. Violations by the United States of the fundamental principles of international law are considerably more harmful to the international order than are similar violations by other countries. The actions of the United States in Nicaragua diminish the respect and credibility of international law, and its actions set a precedent for other countries to engage in similar illegal conduct. The result is a decline in the effectiveness of international law and a rise in the lawlessness of international society.

A substantial portion of international law is based on the treaty system which exists between countries. Treaties allow states to set the standards of behavior or conduct that they may employ in their mutual relations. Treaties are reciprocal agreements between countries. Unlawful behavior is constrained by the theory that each country is prohibited from acting illegally toward the other. The violation of a treaty obligation interjects uncertainty and mistrust into the international system. John Stuart Mill wrote: "The rules of ordinary international morality imply reciprocity. But the barbarians will not reciprocate. . . ."[252] Violations by the United States of its treaty obligations, and of the UN and OAS Charters, undermine the credibility of the structure of treaties governing international relations.

The actions of the United States also have grave implications for international organizations such as the ICJ and the UN. Its decision to boycott the ICJ proceedings on Nicaragua's application undermines the Court's effectiveness as a judicial forum for the peaceful

250. U.N. CHARTER art. 41.
251. U.N. CHARTER art. 42.
252. Gootlieb, *How to Rescue International Law*, 50 COMMENTARY 46 (1984).

resolution of international disputes. States will be less willing to utilize the ICJ as a method of settling disputes when it appears likely that the opponent party will boycott the proceedings. Similarly, the United States' actions conflict with the fundamental purpose of the UN, which is to resolve international disputes in a peaceful manner. The use of force by the United States is in direct contravention of this principle. By not working within the framework of these international organizations, the United States has contributed to the disrespect often accorded to international law.[253]

CONCLUSION

From a Machiavellian perspective, the actions of the United States in Nicaragua are a legitimate means of achieving a valid end. From an international law perspective, however, the methods employed by the United States are in violation of international standards of behavior. Such conduct serves not only to tarnish the credibility of international law, but also to diminish respect for the United States in the international community.

KEITH T. SCHULZ

253. This Comment has not dealt with the legality of the United States' actions in Nicaragua under domestic law. The United States' support of covert operations in Nicaragua raises questions in at least three areas. First, the United States' actions appear to compromise the Neutrality Act, 18 U.S.C. 960 (1976), which prohibits United States participation in military efforts against a country with which it is at peace. Second, the Boland amendment, part of the 1983 Fiscal Appropriations Act, prohibits the use of funds to support military activities designed to overthrow the government of Nicaragua. Pub. L. No. 97-377 793, 96 Stat. 1865 (1982). Third, covert funding of *contra* forces raises the issue of the scope of presidential power under the War Powers Act to authorize military actions without the consent of Congress.